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May 8, 2018

Daniel H. Jorjani
Principal Deputy Solicitor
Office of the Solicitor
United States Department of the Interior
1849 C St. NW
Washington, D.C. 20240

Dear Mr. Jorjani:

We represent the Houlton Band of Maliseet Indians ("Houlton Band" or "Maliseets") and write regarding the letter from the United States Department of the Interior ("Department"), Office of the Solicitor, to Matthew Z. Leopold, General Counsel at the United States Environmental Protection Agency ("EPA"). That letter is dated April 27, 2018, was filed in the United States District Court for the District of Maine on May 7, 2018, and concerns "Maine's Water Quality Standards and [the] Tribal Fishing Rights of Maine's Tribes" ("April 2018 Letter"). We write for two related reasons. First, the legal and historical record establishes unequivocally that the Houlton Band enjoys federally-protected tribal fishing rights, which the April 2018 Letter erroneously calls into question. Second, government-to-government consultation prior to the drafting and transmission of the April 2018 Letter would have allowed the Houlton Band to address and alleviate the Department's newfound uncertainty regarding those rights.

The April 2018 Letter arises from the Department's determination that a clarification is necessary in order to constrain the analysis in the January 30, 2015 letter from the Department's Solicitor to EPA General Counsel ("2015 Letter") solely to tribal fishing rights within the State of Maine. April 2018 Letter at 1. The Department then "undert[akes] further analysis of the issues discussed in the Solicitor's 2015 Letter," *id.* at 2, and in doing so casts doubt on whether the Houlton Band retains its federally-protected tribal fishing rights. Specifically, on page 3, the Department states:

> Whereas our review of the record affirms the analysis by which the Solicitor's 2015 Letter recognized the Southern Tribes' extant right to sustenance fishing, we find ourselves unable to identify with similar clarity federally-protected tribal fishing rights for the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs (the "Northern Tribes"). And while we affirm the proposition contained in the 2015 Letter that express language in a treaty is not necessary to establish the

> existence of a tribal fishing right, we note that such rights *only* arise from treaty, statute, the federal set aside and supervision of lands that include bodies of water inhabited by fish, or the retention of aboriginal rights. Despite concerns about whether the Northern Tribes[] retained their fishing rights, we continue to recognize the centrality of sustenance fishing to the culture of the Northern Tribes.

April 2018 Letter at 3. The letter concludes by stating that the Department's January 2015 analysis regarding the subsidiary rights encompassed within tribal fishing rights is "expressly constrain[ed] . . . to the Southern Tribes of Maine." *Id.* at 5.

These portions of the April 2018 Letter are at odds with the Department's earlier analyses regarding the Houlton Band's federally-protected rights and the bedrock principles of federal Indian law on which they rest. The April 2018 Letter states, "while . . . express language in a treaty is not necessary to establish the existence of a tribal fishing right, . . . such rights *only* arise from treaty, statute, the federal set aside and supervision of lands that include bodies of water inhabited by fish, or the retention of aboriginal rights." April 2018 Letter at 3. We generally agree with this articulation of the governing standard, but we object wholeheartedly to the unsupported notion that there exists any uncertainty regarding the status of the Houlton Band's federally-protected tribal fishing rights under it. To the contrary, the Department has analyzed and affirmed the existence of the Houlton Band's federally-protected rights pursuant to this standard on multiple occasions in the past.[1] *See, e.g.*, 2015 Letter (Attachment B) at 4-7; Letter from Associate Solicitor, Division of Indian Affairs, Office of the Solicitor to Eastern Area Director, Bureau of Indian Affairs Re: "Reservation Status of the Houlton Band of Maliseet Indians Under Federal and State Law," at 2 (Jan. 15,1993) (Attachment C); Solicitor's Opinion attached to Letter from Edward B. Cohen, Office of the Solicitor, Dep't of Interior to Gary S. Guzy, Office of General Counsel, Envtl. Protection Agency, at 2 (May 16, 2000) (Attachment D) (regarding Maine's application for the delegation of National Pollutant Discharge Elimination System authority in Indian waters in Maine).

The "Wolastoqewiyik", or Maliseet Indians, are river people who have fished, hunted, trapped, and gathered natural resources in the "Wolastoq" or St. John watershed for thousands of years. These resources are central to the Maliseet diet, culture, traditions, spirituality, and health and welfare. Congress recognized the Maliseet way of life in the Maine Indian Claims Settlement Act (MICSA). *See, e.g.*, S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation. . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."). MICSA and the Maine Implementing Act accordingly provided for a homeland for the Houlton Band by authorizing the acquisition and setting aside of "land or natural resources" in trust for the Band. *See* 25 U.S.C. § 1724(d); Note, Public Law No. 99-566,

[1] A map depicting the Houlton Band's trust lands has been included at Attachment A.

§ 4(a) (Oct. 27, 1986). Congress explained that these trust resources would substitute and were in exchange for the Houlton Band's aboriginal lands and natural resources. S. Rep. No. 96-957 at 24 (explaining that "[t]he land . . . is intended to constitute satisfaction of the Band's legal claims" and that Congress seeks "to settle all Indian land claims in Maine fairly"); *see also* 25 U.S.C. § 1721 (findings and purpose), and §1723 (relinquishing lands and natural resources). The Department confirmed on January 15, 1993, that Maliseet trust lands acquired under MICSA located on both banks of the Meduxnekeag River, a tributary of the St. John, are an Indian reservation for purposes of federal law. Attachment C at 2 ("The Houlton Band unquestionably meets the *Potawatomi* test because [MICSA] clearly states that land purchased by the Houlton Band with federal funds set aside by Congress for that purpose shall be taken into trust by the United States. Therefore, the Houlton Band of Maliseets has an Indian reservation for the purposes of federal law, subject only to the limitations contained in [MICSA] that apply to all federal Indian reservations in Maine").

As a matter of federal law, the lands and natural resources held in trust by the United States for the benefit of the Houlton Band include water and fishing rights. Federal common law is clear that when Congress sets aside lands in trust for the use and benefit of an Indian tribe or individual Indians, as it did for the Houlton Band, Congress impliedly reserves water and fishing rights where necessary to effectuate the purposes of the set aside. *See, e.g., Menominee Tribe of Indians v. United States,* 391 U.S. 404, 405-06 (1968) (holding that lands acquired for a tribe in exchange for the relinquishment of other lands include implied hunting and fishing rights); *Arizona v. California*, 373 U.S. 546, 599 (1963) (finding implied water rights where "water from the River would be essential to the life of the Indian people and to the animals they hunted and the crops they raised"); *Winters v. United States,* 207 U.S. 564, 577 (1908) (holding that tribe impliedly reserved water rights to support beneficial use of its lands). This reservation of federal rights occurs regardless of whether the lands are set aside by treaty, executive order, or statute. *See, e.g., United States v. Dion,* 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implied hunting rights as those created by treaty."). For example, in *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78, 86-88 (1918), the Supreme Court held that where Congress set aside lands for the landless Metlakahtla Indians, it impliedly reserved fishing rights in adjacent waters. The Indians were historically fishers and hunters, and the lands were chosen to provide them access to the fishing grounds. *Id.* at 88-89. Similarly, in *Colville Confederated Tribes v. Walton,* 647 F.2d 42, 48 (9th Cir. 1981), the court held that Congress impliedly reserved water rights to support the tribal fishery on tribal trust lands where "[t]he Colvilles traditionally fished for both salmon and trout. Like other Pacific Northwest Indians, fishing was of economic and religious importance to them."

Through MICSA, Congress acquired lands in trust for the benefit of the Houlton Band to provide the landless Maliseet Indians a home where they could preserve their

riverine culture and engage in traditional fishing, hunting, and gathering activities. *See* S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation . . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River."); *id.* at 24 ("The Houlton Band is impoverished, it is small in number, it has no trust fund to look to, and it is questionable whether the land to be acquired for it will be utilized in an income-producing fashion in the foreseeable future."). As the Department of the Interior expected, the Tribe's reservation is located in eastern Aroostook County on the Meduxnekeag River, adjacent to one of the river's best fishing holes. *See* H.R. Rep. No. 96-1353 (Report of the Department of the Interior, Aug. 25, 1980). Accordingly, in reserving these lands Congress concurrently reserved water and fishing rights for the Tribe – the purpose of the reservation would have been defeated otherwise.

The Houlton Band's federally-protected water and fishing rights include the right to water of sufficient quantity and quality to support tribal fishing activities and other uses. *See United States v. Adair,* 723 F.2d 1394, 1408-11 (9th Cir. 1983). The leading federal Indian law treatise explains:

> To meet federal purposes, Indian reserved water rights should be protected against . . . impairments of water quality, as well as against diminutions in quantity . . . . Fulfilling the purposes of Indian reservations depends on the tribes receiving water of adequate quality as well as sufficient quantity. . . . The quality of the water necessary for [tribal] uses may vary from the high quality needed for human consumption to a lesser quality for fish and wildlife habitat to an even lower quality for irrigation. Each use, however, requires water that is appropriate quality to support that use.
>
> The quality and quantity of water may be directly related. This interrelationship is most evident in the case of a reserved right to water for fisheries preservation. The right reserved is that amount of water necessary to maintain the fishery. The fishery consists not only of the fish themselves, but also of the conditions necessary to their survival. Thus, habitat protection is an integral component of the reserved right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted).

The Department and EPA therefore have a trust obligation to protect the quality of Maliseet waters, which are the lifeblood of the Maliseet people and which support the fish, animals, and plants at the core of their diet and culture. *See, e.g., Parravano v.*

Babbitt, 70 F.3d 539, 546-47 (9th Cir. 1995) (recognizing the United States' trust obligation to protect impliedly reserved fishing rights); *see also generally,* State Program Requirements: Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program, 68 Fed. Reg. 65,052, 65,056 (Nov. 18, 2003) ("Clearly, the physical setting of the . . . tribes in such close proximity to important rivers makes surface water quality important to them and their riverine culture."). As the Solicitor concluded in regard to Maine's initial application for NPDES authority in Indian country:

> EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect Maliseet and Micmac tribal water quality from degradation. EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. Specifically, EPA would have to consider the specific uses the Maliseets and Micmacs make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets and Micmacs even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

Attachment D at 2. The same is true with regard to EPA's evaluation of and setting of water quality standards, as recognized in the 2015 Letter. Attachment B at 6-7.

MICSA and the Maine Implementing Act do not speak to the Houlton Band's water and fishing rights in precisely the same manner as the legislation speaks to the rights of the Passamaquoddy Tribe and the Penobscot Nation. However, nothing in that distinction or elsewhere in MICSA demonstrates, or even suggests, the absence of federally-protected water and fishing rights for the Maliseets. First, as discussed above, it is well-established that when the United States sets aside lands in trust for an Indian tribe, it impliedly reserves water and fishing rights necessary to fulfill the purposes of the set-aside, regardless of whether the treaty, statute, or executive order expressly refers to such rights. *See, e.g., United States v. Aanerud,* 893 F.2d 956, 958 (8th Cir. 1990) (holding that tribal members have federally-protected right to harvest natural resources on tribal lands notwithstanding silence in treaty setting aside lands for tribe). Second, MICSA and the Maine Implementing Act contemplate these rights, defining the "lands or natural resources" held in trust for the Houlton Band to include "any interest in or right involving any real property or natural resources, including . . . water and water rights, and hunting and fishing rights." 25 U.S.C. § 1722(b); Me. Rev. Stat. tit. 30, § 6203(3). Third, the relevant provisions in the Maine Implementing Act regarding the Passamaquoddy Tribe

and the Penobscot Nation are directed at *the State's regulatory authority* over the tribes' exercise of fishing rights on their reservations, not the existence of those rights in the first place. *See* Me. Rev. Stat. tit. 30, § 6207(1), (4); S. Rep. No. 96-957 at 16-17, 37; *see also* Me. Rev. Stat. tit. 30, § 6206(1). Fourth, Congress confirmed in MICSA that Maliseet trust lands would be treated in the same manner as any other Indian reservation, *see* 25 U.S.C. § 1725(i), and the Department of the Interior has confirmed that Maliseet trust lands are an Indian reservation for purposes of federal law.[2]

To the extent the Department sees any ambiguity in MICSA or in the foregoing discussion of the Tribe's federally-protected water and fishing rights, that ambiguity must be resolved in the Band's favor. Federal statutes relating to Indian tribes must be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985), and Congressional acts diminishing sovereign tribal rights must be strictly construed, with ambiguous provisions again interpreted to the tribe's benefit, *Penobscot Nation v. Fellencer,* 164 F.3d 706, 709 (1st Cir. 1999). It is settled law that these Indian canons apply to Indian claim settlement acts, including MICSA. *Id.* at 708-09; *see also, e.g., Parravano v. Babbitt,* 70 F.3d at 546; *Connecticut ex rel. Blumenthal v. U.S. Dept. of Interior,* 228 F.3d 82, 92 (2d Cir. 2000).

In sum, when the Houlton Band and its members use Maliseet waters, including for sustenance fishing in the Meduxnekeag River, they exercise rights vindicated and protected by federal law. These rights define and lie at the heart of both the Department's and EPA's trust responsibility to the Band, including in the setting of water quality standards.

Regarding the Department's lack of consultation with the Houlton Band in this matter, we understand that the Department conducted a short conference call with Maliseet Chief Clarissa Sabattis and Micmac Chief Edward Peter-Paul on April 27, 2018. The call was not a consultation – there was no prior notice as to its subject matter, and on it the leaders were simply informed that a decision relating to their fishing rights *had already been made*. This does not amount to the government-to-government consultation owed federally recognized tribes, nor does it comport with the Department's trust responsibility toward them. Moreover, the Department did not share its letter with the Tribes. None of this is in keeping with the Department's duties under Executive Order 13175 and Secretarial Order 3317 Sec. 4.b ("Consultation is a process that aims to create effective collaboration with Indian tribes and to inform Federal decision-makers. Consultation is built upon government-to-government exchange of information and

[2] Indeed, MICSA expressly provides that the same principles of federal law apply to the Houlton Band as apply to other federally-recognized Indian tribes. *See* 25 U.S.C. § 1725(h); *see also* 25 C.F.R. § 83.12(a) (providing that upon federal recognition, a tribe "shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States").

promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian tribes or the government-to-government consultation process."). *See also* Department of the Interior Policy on Consultation with Indian Tribes at 3 (definition of "departmental action with tribal implications"), 7-8 (consultation guidelines), 11-13 (stages of consultation), *available at* https://www.doi.gov/sites/doi.gov/files/migrated/-cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf (last visited May 6, 2018). Had the Department engaged in appropriate consultation with the Band, the Band could have reiterated the nature of its rights for the Department and pointed the Department to its many past pronouncements regarding the same.

We are uncertain what prompted the Department's sudden unsupportable stance on the nature of the Houlton Band's fishing rights, in contravention of multiple long-standing Department analyses and core principles of federal Indian law, but we certainly hope it is a temporary oversight. The Department is not writing on a blank slate, and we feel confident that the contents of this letter and its attachments will provide more than enough material for you to "identify with similar clarity federally protected tribal fishing rights for the Houlton Band of Maliseet Indians." If you have questions, please contact Riyaz Kanji (Ann Arbor) or Jane Steadman (Seattle) at the numbers listed in the letterhead.

Sincerely,

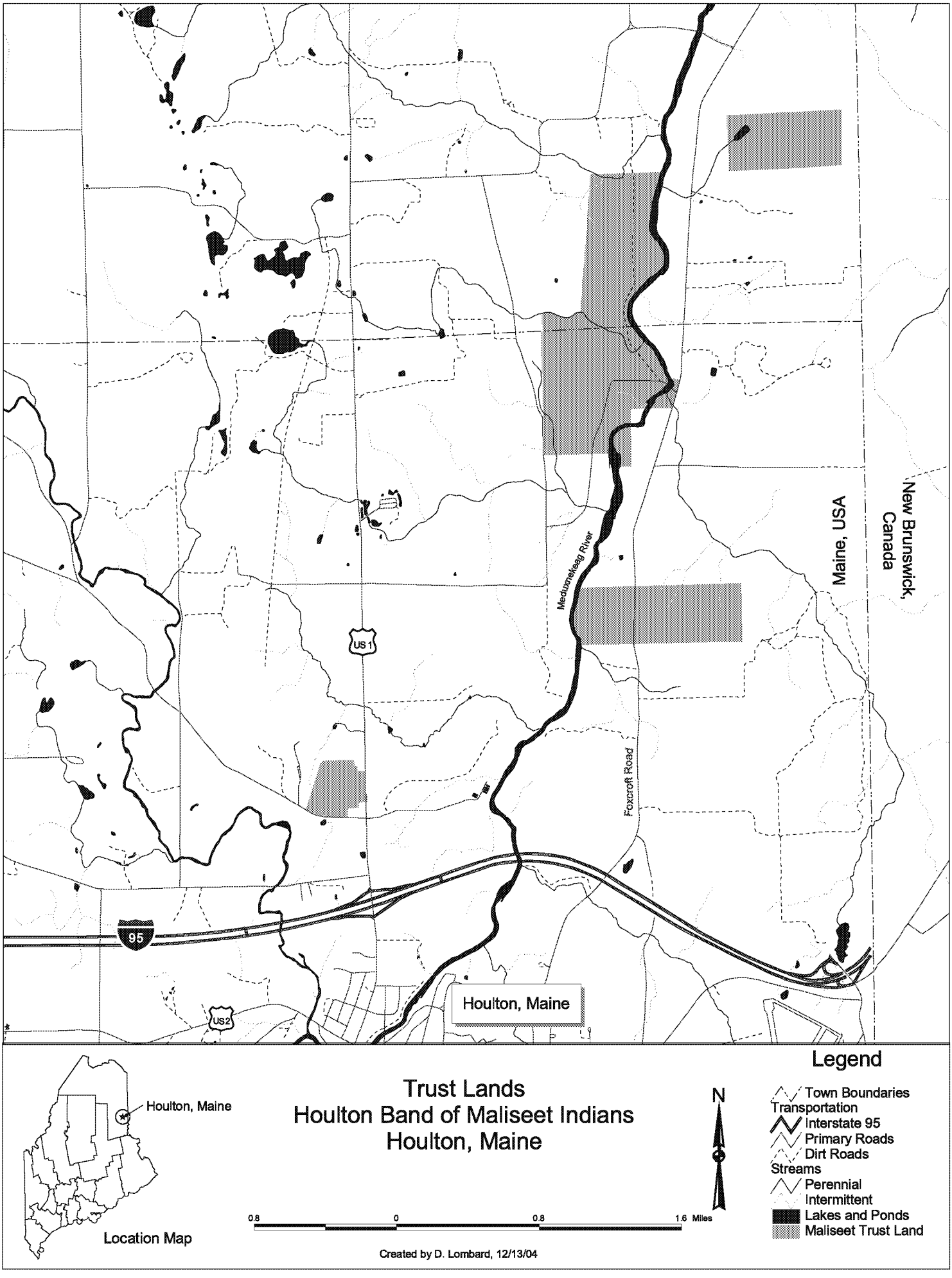
Riyaz Kanji
Jane Steadman
KANJI & KATZEN, PLLC

Counsel for the Houlton Band of Maliseet Indians

RAK/JGS:tlw

Cc:
Chief Clarissa Sabattis, Houlton Band of Maliseet Indians
John Tahsuda, Principal Deputy Assistant Secretary, Bureau of Indian Affairs
Matthew Z. Leopold, General Counsel, U.S. Environmental Protection Agency
Alexandra Dunn, Region 1 Administrator, U.S. Environmental Protection Agency, Region 1
Tim Williamson, Deputy Regional Counsel, Office of Regional Counsel, EPA Region 1
David Carson, Senior Counsel, Env't & Natural Resources Division, U.S. Department of Justice

ATTACHMENT A


Maine, USA
New Brunswick, Canada
Medunnekeag River
US 1
Foxcroft Road
95
US2
Houlton, Maine
Houlton, Maine
Location Map
Trust Lands
Houlton Band of Maliseet Indians
Houlton, Maine
N
0.8
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0.8
1.6 Miles
Created by D. Lombard, 12/13/04
Legend
Town Boundaries
Transportation
Interstate 95
Primary Roads
Dirt Roads
Streams
Perennial
Intermittent
Lakes and Ponds
Maliseet Trust Land

ATTACHMENT B

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

JAN 30 2015

Avi S. Garbow
General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: Maine's WQS and Tribal Fishing Rights of Maine Tribes

Dear Mr. Garbow:

The State of Maine has submitted proposals to the Environmental Protection Agency (EPA) to implement Water Quality Standards (WQS) within waters set aside for federally recognized tribes under applicable state and Federal law for uses including sustenance fishing (hereinafter described as Maine Indian Waters).[1] To assist in your review of Maine's proposals, you have asked for the Department of the Interior's views regarding tribal fishing rights in Maine and particularly the relationship between tribal fishing rights and water quality. We have reviewed applicable law and, for the reasons explained below, conclude that all four of the Maine tribes—the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Aroostook Band of Micmacs—have federally-protected tribal fishing rights. These fishing rights should be taken into account in evaluating the adequacy of WQS in Maine.

1. Overview of Tribal Fishing Rights in Maine Indian Waters

As you are well aware, the four federally recognized Indian tribes in the State of Maine are subject to a unique statutory framework established by the state-law Act to Implement the Maine Indian Claims Settlement ("Maine Implementing Act"),[2] the state-law Micmac Settlement Act,[3] the federal Maine Indian Claims Settlement Act ("MICSA"),[4] and the

[1] We note that the exact boundaries of at least some Indian lands and territories in Maine remain in dispute. For example, the United States has intervened in a lawsuit filed by the Penobscot Nation against Maine claiming that the Penobscot Reservation includes waters in the Main Stem of the Penobscot River. *See* Order on Pending Motions in *Penobscot Nation v. Mills*, 1:12-cv-00254-GZS (D. Maine Feb. 4, 2014) (granting US motion to intervene). It is beyond the scope of this letter to precisely identify all Maine Indian Waters. The location of Maine Indian Waters for each Tribe would have to be defined based on all applicable law, including statutory language, applicable property law doctrine, and lands reserved by treaty and retained by the tribes pursuant to statute. We do not elaborate here on the question of whether the Maine tribes have additional fishing rights outside of Indian lands and territories.

[2] 30 M.R.S. §§ 6201 *et seq.*

[3] 30 M.R.S. §§ 7201 *et seq.*

[4] 25 U.S.C. §§ 1721 *et seq.*

federal Aroostook Band of Micmacs Settlement Act[5] (collectively the "Settlement Acts").[6]

There is no dispute that the four Maine tribes have historically engaged in fishing in Maine waters and that fishing is an important cultural and economic activity for Maine tribal members.[7] Because of differences in their history and applicable statutory language, the fishing rights of the two Southern Tribes—the Passamaquoddy Tribe and the Penobscot Indian Nation— derive from different legal sources than the fishing rights of the Northern Tribes—the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. But all Maine tribes possess fishing rights that EPA should consider when analyzing proposed water quality standards in Maine.

The fishing rights of the Passamaquoddy Tribe and Penobscot Indian Nation in their Reservation waters[8] are expressly reserved[9] fishing rights: the Maine Implementing Act

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[5] P.L. 102-171, 105 Stat. 1143 (1991).

[6] In MICSA, Congress formally confirmed the federal recognition of the Penobscot Nation, the Passamaquoddy Tribe and the Houlton Band of Maliseet Indians. 25 U.S.C. § 1725(i). Federal recognition was extended to the Aroostook Band of Micmacs eleven years later with the enactment of P.L. 102-171 (Sec. 6(a)), so now these four Maine tribes are recognized as eligible for the rights and benefits of Indian tribal status. *See generally* 25 U.S.C. § 479a-1(a) (providing for listing of federally recognized tribes that are all entitled to "services provided by the United States to Indians because of their status as Indians").

[7] Notably, several standalone provisions in Maine law recognize and arguably encourage the continuing centrality of fishing to the traditions and health of Maine tribes. First, the State of Maine recognizes and facilitates fishing as a central part of tribal culture by issuing permits to tribal members to fish in Maine waters at no cost. 12 M.R.S. § 10853(8). Second, the State has enacted legislation providing for special treatment of tribal members engaged in fishing for marine organisms, exempting them from many state permitting requirements and providing a broad exemption for many tribal sustenance and ceremonial uses. 12 M.R.S. § 6302-A. Concerns of the tribes with the process by which this language was adopted and objections to the definition of sustenance are explained in a recent report by the Maine Tribal-State Commission. Me. Indian Tribal-State Comm'n, *Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine* (June 17, 2014), *available at* http://www.mitsc.org/documents/148_2014-10-2MITSCbook-WEB.pdf ("Commission Saltwater Fisheries Report").

[8] 30 M.R.S. § 6203(5) (defining Passamaquoddy Indian Reservation as "those lands reserved to the Passamaquoddy Tribe by agreement with the State of Massachusetts dated September 19, 1794" except for lands transferred by the Tribe after these treaties but before enactment of the Maine Implementing Act, and with certain additional specifications); § 6203(8) (defining Penobscot Indian Reservation as "the islands in the Penobscot River reserved to the Penobscot Nation by agreement with the States of Massachusetts and Maine" except for islands transferred by the Tribe after these treaties but before the enactment of the Maine Implementing Act and with the addition of other specifically enumerated parcels). Legislative history confirms that the Reservations include riparian and littoral rights under State law or treaties:

> The boundaries of the Reservations are limited to those areas described in the bill, but include any riparian or littoral rights expressly reserved by the original treaties with Massachusetts or by operation of state law.

State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.

[9] A reserved right is a right that has been retained since aboriginal times. Section 6207(4)'s sustenance fishing right applies within these Reservations retained by the Southern Tribes first under treaties and now under the Settlement Acts, see *supra* note 8, since aboriginal times. Congress used an apt phrase that

acknowledges the right of Penobscot Nation and Passamaquoddy members to "take fish . . . for their individual sustenance" within their reservations free of state regulation.[10]

These statutorily-acknowledged fishing rights are rooted in treaty guarantees[11] that were upheld through the Settlement Acts. The Passamaquoddy Tribe's 1794 treaty with the State of Massachusetts explicitly reserves a Passamaquoddy fishing right in the St. Croix River (then known as the Schoodic River): the treaty guarantees "to said Indians the privilege of fishing on both branches of the river Schoodic without hindrance or molestation."[12] The Penobscot treaties of 1818 (with Massachusetts) and 1820 (with Maine) do not expressly mention fishing rights because they did not cede the Penobscot River, explicitly retaining islands and granting to non-members only the right to "pass and repass" the River. The Penobscot Nation had historically relied on fishing, and the islands mentioned in the Treaty would have been of little value if they were not accompanied by fishing grounds.[13]

The Maine Implementing Act further provides for tribal sustenance fishing in certain ponds on lands located outside the Southern Tribes' reservations, but held in trust by the United States as part of the Indian territories established under the Settlement Acts. The Southern Tribes have exclusive authority to enact ordinances regulating the taking of fish on ponds of less than ten acres in their trust lands which "may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation."[14] The Maine Implementing Act also includes special provisions for

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captures the reserved right concept in the legislative history for the Federal Maine Indian Claims Settlement Act, characterizing fishing rights as an example of natural resources considered "expressly retained sovereign activities." H.R. Rep. No. 96-1353 at p 15 (1980).

[10] This reading is established by language in 30 M.R.S. § 6207(4):

> Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6 [providing for the State to limit tribal fishing if necessary to protect the stock of fish].

State regulation is allowed only in the case of conservation necessity, as laid out in the Maine Implementing Act at 30 M.R.S. § 6207(6).

[11] These treaties were State treaties, negotiated not with the United States but with the Commonwealth of Massachusetts; Maine later adopted the responsibility to implement these treaties in its state constitution. See Maine Constitution, Art. X, Sec. 5:

> The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise.

Available at http://www.maine.gov/legis/lawlib/const1820.pdf. (Note that per Art. X, Sec. 7, the text quoted here is omitted from printed copies of the Maine Constitution, but still remains in force and effect.). The Settlement Acts preempt any contrary language in the treaties, but the legislative history discussed in *supra* note 8 explains that expressly reserved riparian rights under the treaties were retained under the Settlement Acts.

[12] The text of the treaty is available at http://www.wabanaki.com/1794_treaty.htm.

[13] *See, e.g., Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 86-89 (1918) (holding that where Congress set aside lands for the Metlakahtla Indians, a fishing tribe, it impliedly reserved fishing rights in the adjacent waters).

[14] 30 M.R.S. § 6207(1).

regulation of certain waters by the Maine Indian Tribal-State Commission.[15] Thus, through the Maine Implementing Act, the State has recognized the Southern Tribes' sustenance fishing rights within their territories, and the importance of fish to tribal members' diet.

Although the term "sustenance" is not defined in the Settlement Acts, it is reasonable to conclude that the term encompasses, at a minimum, the notion of tribal members taking fish to nourish and sustain themselves. Moreover, the Indian law canons of construction require that ambiguous terms in statutes must be construed "most favorably towards tribal interests."[16] Where fishing rights of traditional fishing tribes are concerned, this rule of liberal construction applies with special force: one court has held that treaties must be construed "in the sense in which they would naturally be understood by the Indians . . . . especially the reference to the right of taking fish."[17] The term "sustenance" in section 6207(4) of the Maine Implementing Act should thus be construed broadly[18] to incorporate at least the right of tribal members to take sufficient fish to nourish and sustain them,[19] with no specific quantitative limits other than the conservation necessity limit that the statutory language specifically places on the tribal fishing right.[20] When interpreting the scope of the Maine tribes' fishing right as the tribes would understand them, EPA should consider that the tribes' ability to fish was, and continues to be, essential to their livelihood and culture.

The sources of the fishing rights of Maine's Northern Tribes are different in that they are not discussed explicitly in the Settlement Acts. However, express language in a statute or

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[15] The Commission is an intergovernmental body made up of members appointed by the Tribes and the State. 30 M.R.S. § 6212. 30 M.R.S. § 6207(3) authorizes the Commission to promulgate fishing rules and regulations within specified waters on or adjoining the Penobscot Nation's and Passamaquoddy Tribe's territories, taking into account the "needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes."

[16] *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1032 (9th Cir. 2010). *See also Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). The Indian canons of construction have been held to apply to interpretation of the Settlement Acts. *See infra* note 48 and accompanying text.

[17] *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676, 678 (1979).

[18] Tribes have argued that in addition to fishing for individual consumption, the definition of sustenance traditionally incorporated two other components: barter and exchange. Commission Saltwater Fisheries Report, *supra* note 7, at p. 22-23

[19] A study prepared for EPA in collaboration with the Maine Tribes discusses what level of fish consumption is representative of sustenance fishing in Maine Indian waters. Harper, Barbara and Darren Ranco, *Wabanaki Traditional Cultural Lifeways Exposure Scenario*, prepared for EPA in collaboration with the Maine Tribes, July 9, 2009, available at http://www.epa.gov/region1/govt/tribes/pdfs/DITCA.pdf.

[20] This statutory provision establishing a right of the State to regulate in limited situations of conservation necessity is consistent with the federal common law rule. *See United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1990) (describing findings that court must make in order to uphold regulation of treaty rights to take fish, including that "States must consider the protection of the treaty right to take fish . . . as an objective co-equal with the conservation of the fish runs for other uses"); *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974) ("Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.").

treaty is not necessary to establish the existence of a tribal fishing right.[21] Tribal fishing rights are implied through an analysis of the purpose of these land settlements—to create a permanent land base—and the trust property interests created pursuant to the Acts. As described below, these fishing rights are also rooted in state common law on the right of riparian owners to fish on their properties in addition to the Settlement Acts and federal common law on the importance and durability of tribal fishing rights.

The fundamental requirement for a fishing right is access to fishable waters, and legislative history for the Maine Implementing Act specifically addresses the issue of the tribes' access to waters in connection with their trust lands:

> Any lands acquired by purchase or trade may include riparian or littoral rights to the extent they are conveyed by the selling party or included by general principles of law.[22]

This language allows for riparian rights to attach to the tribal trust lands held by the United States for the Northern Tribes, which are acquired by purchase and then put into trust.[23] In Maine, a right to fish is a right "included by general principles of law" when riparian lands are acquired,[24] and this language thus confirms that Maine's legislature recognized the right of the Maine tribes to engage in fishing on their reservation and trust

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[21] The hunting and fishing rights that were held to survive termination of the Tribe's status as a federally recognized tribe in the seminal case *Menominee Tribe of Indians v. United States* were created by treaty language providing that tribal land would be "held as Indian lands are held." 391 U.S. 404, 405-06 (1968). *See also United States v. Dion*, 476 U.S. 734, 738 (1986) (explaining that "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress," and that these rights need not be expressly mentioned in the treaty). State regulatory jurisdiction is not incompatible with a tribal fishing right; the existence of state laws dealing with tribal fishing in Maine, *see supra* note 7, reinforces that the State acknowledges the importance of tribal fishing rights. Carole E. Goldberg et al., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 1177-78 (6th ed. 2010) ("It is important to see that jurisdictional protections supplement rather than displace tribal property rights to hunt and fish.").

[22] State of Maine, Maine legislature, Joint Select Committee on the Indian Land Claims, Report of the Joint Select Committee on Indian Land Claims Relating to LD 2037 "An Act to provide for Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory," at p. 3, para. 14.

[23] *See* 25 U.S.C. § 1724(d)(4) (providing for "land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band"); 30 M.R.S. § 6205-A (providing for acquisition of "Houlton Band Trust Land"; P.L. 102-171, 105 Stat. 1143, § 5 (providing for acquisition of "Aroostook Band Trust Lands"); 30 M.R.S. § 7202(2) (defining Aroostook Band Trust Land).

[24] The right of riparian landowners to fish is predicated on both State and federal common law. Based on the default Maine property rule, owners of riparian land also own out to the thread, or middle, of most streams. *Wilson & Son v. Harrisburg*, 107 Me. 207, 211 (1910) ("With respect to the rights of the riparian proprietor in floatable and non-tidal streams, it is the settled law of this State that he owns the bed of the river to the middle of the stream and all but the public right of passage."). Riparian property owners have the right to fish on their lands. *See* Answers to Questions Propounded to the Justices of the Supreme Judicial Court by the House of Representatives, 118 Me. 503, 507 (1919) (noting that "[t]he riparian proprietor has the right to take fish from the water over his own land").

lands alike when these lands are riparian to fishable waters. On the Northern Tribes' trust lands, this right is subject to reasonable State regulation.[25]

Even more importantly, however, the Northern Tribes[26] have more than the right of a Maine citizen to fish – they have the right to do so on lands set aside and held in trust for them. The establishment of trust land is one of the most important functions the United States performs for tribes. Trust lands provide a permanent land base, protecting these lands against loss,[27] and providing territory over which tribes may exercise governmental authority, albeit subject to the constraints imposed by the Settlement Acts.[28] Trust lands also protect and sustain tribal culture and ways of life, including tribal sustenance fishing

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[25] The Settlement Acts provide that State law applies to the trust lands of the Northern Tribes. We describe this as a right of "reasonable regulation" because the Settlement Acts did not contemplate and should not be read to allow State law that is discriminatory against tribes or not consistent with the Settlement Acts, including the federal purpose of holding this land base in trust. In section 1725(a) of MICSA, Congress approved 30 M.R.S. § 6204 of the Maine Implementing Act regarding the application of state law to Indian lands, specifying that Maine civil and criminal law would generally apply to these lands. While conferring civil and criminal jurisdiction on the State of Maine over the Northern Tribes' trust lands, nothing in section 1725 abrogates federal authority to protect these tribal trust lands. 25 U.S.C. § 1725(a) reads:

> Except as provided in section 1727(e) [dealing with Indian Child Welfare Act definitions] and section 1724(d)(4) [regarding acquisition of land and natural resources for the Houlton Band of Maliseet Indians] of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

[26] This discussion is aimed at the Northern Tribes, but we note that some of the Southern Tribes' Territories include lands held in trust that would have fishing rights based on this same trust land focused analysis. Some, but not all, of these lands have fishing rights confirmed through other statutory language, *see supra* notes 14-15 and accompanying text.

[27] For the Houlton Band of Maliseet Indians, 30 M.R.S. § 6205-A(3) describes restraints against alienation of these trust lands. The same language applying to the trust land of the Aroostook Band of Micmacs,is found at 30 M.R.S. § 7204(3). With respect to the Micmacs, legislative history is even plainer that Congress intended the trust lands to provide a land base for subsistence purposes: "The ancestors of the Aroostook Micmac made a living as migratory hunters, trappers, fishers and gatherers until the 19th century . . . .Today, without a tribal subsistence base of their own, most Micmacs in Northern Maine occupy a niche at the lowest level of the social order." S. Rep. No. 102-136 at 5, 9 (1991) (quoting testimony of Dr. Harold E.L. Prins).

[28] Even for the Northern Tribes, the Maine Implementing Act recognizes that the tribes may retain certain aspects of governmental authority over tribal members. For example, 30 M.R.S. §6209-C(1)(a) provides:

> The Houlton Band of Maliseet Indians has the right to exercise exclusive jurisdiction, separate and distinct from the State, over . . . [c]riminal offenses for which the maximum potential term of imprisonment does not exceed one year and the maximum potential fine does not exceed $5,000 and that are committed on the Houlton Band Jurisdiction Land by a member of the Houlton Band of Maliseet Indians, except when committed against a person who is not a member of the Houlton Band of Maliseet Indians or against the property of a person who is not a member of the Houlton Band of Maliseet Indians.

practices, which fosters tribal self-determination.[29] The legislative history for MICSA supports the view that one of Congress's purposes in providing Maine tribes with a land base was to preserve their culture.[30] The connection between fishing rights and land ownership is particularly emphasized in the Settlement Acts: the Maine Implementing Act defines the "land or other natural resources" to be purchased with federal funds and placed into trust as "any real property or other natural resources, or any interest in or right involving any real property or other natural resources, including, but without limitation, minerals and mineral rights, timber and timber rights, water and water rights and hunting and *fishing rights*."[31] The exercise of these fishing rights by Tribes is fully consistent with the Settlement Acts.[32]

In sum, the Federal Government as the owner of the trust lands for the benefit of the Tribes has a substantial interest in providing all Maine tribes, including the Northern Tribes, with a functional land base that ensures the continuation of their sustenance practices and cultural activities.[33]

2. Tribal Fishing Rights Include the Subsidiary Right to Sufficient Water Quality to Render the Rights Meaningful.

In Maine, EPA must determine how tribal fishing rights intersect with EPA's authority under the Clean Water Act to approve or disapprove State WQS. We are not aware of any case law addressing an identical situation to the one raised by Maine's proposed WQS. However, Federal courts have acknowledged the importance of permanent, enforceable fishing rights for tribes and have interpreted these rights expansively.

Tribal fishing rights encompass subsidiary rights that are not explicitly included in treaty or statutory language but are nonetheless necessary to render them meaningful. For example, in the 1905 case *United States v. Winans*, the Supreme Court held that a tribe must be allowed to cross private property to access traditional fishing grounds.[34]

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[29] *See* Final Rule, Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928, 67929 (November 13, 2013) (noting in Background section that taking land into trust serves the "goals of protecting and restoring tribal homelands and promoting tribal self-determination" and "reaches the core of the Federal trust responsibility").

[30] Sen. Rep. No. 96-957, at 17 ("Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine."). Several of the Maine tribes submitted comments to the EPA about Maine's WQS describing the centrality of fishing to their cultures.

[31] 30 M.R.S. § 6203(3) (Emphasis added). MICSA includes this definition almost verbatim at 25 U.S.C. § 1722(b). 25 U.S.C. § 1724(d) authorizes the Secretary to "expend . . . the land acquisition fund for the purpose of acquiring land or *natural resources* for the . . . . Houlton Band of Maliseet Indians." Emphasis added. Section 5(a) of the Aroostook Band of Micmacs Settlement Act, P.L. 102-171, provides similarly that the Secretary is authorized "to expend . . . the Land Acquisition Fund for the purposes of acquiring land or natural resources for the Band" and defines natural resources to include fishing rights at section 3(4).

[32] Recognizing that Maine tribes have a tribal fishing right would not impinge upon Maine's right to regulate such a fishing right. The existence of a tribal fishing right does not affect or preempt Maine's regulatory jurisdiction as described in 25 U.S.C. § 1725(h).

[33] See *supra* note 30 and accompanying text.

[34] 198 U.S. 371, 384 (1905).

Similarly in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, the Ninth Circuit held that a tribe's fishing right could be protected by enjoining water withdrawals that would destroy salmon eggs before they could hatch.[35] In *Grand Traverse Band of Ottawa and Chippewa Indians v. Director, Michigan Department of Natural Resources*, the Sixth Circuit found that the treaty right to fish commercially in the Great Lakes includes a right to temporary mooring of treaty fishing vessels at municipal marinas because without such mooring the Indians could not fish commercially.[36] While the issues presented by diminished water quality in Maine are different from the issues presented by inadequate access to fishing places or the need to protect fish populations, the result for tribes if water quality in Maine Indian Waters is not protected is the same: Indian tribes will not be able to fish for their sustenance healthfully.

The rules in the cases identified above are all variations on the fundamental holding of *Washington v. Washington State Commercial Passenger Fishing Vessel Association* that tribes with reserved fishing rights are entitled to something more tangible then "merely the chance . . . occasionally to dip their nets into the territorial waters."[37] The holding of *Washington*, while specific to the treaty language at issue in that case, is consistent with similar holdings from other courts examining the question of whether a tribal fishing right implicitly contains within it the right to additional protections to render the fishing right meaningful. For example, in holding that a Tribe's hunting and fishing rights persisted, the Minnesota Supreme Court explained that "[c]ertainly, it would be incongruous to construe the treaty as denying the Indians their very means of existence while purporting to grant them a home."[38]

In the context of water quantity, courts have recognized that tribal fishing rights include the subsidiary right to water flow sufficient to maintain fish health and reproduction in order to effectuate the fishing right. In *United States v. Adair*, the Ninth Circuit held that the tribe's fishing right implicitly reserved sufficient waters to "secure to the Tribe a continuation of its traditional . . . fishing lifestyle."[39] The logic that supports the tribe's right to water quantity adequate to support a lifestyle based on fishing in *Adair* supports a conclusion that EPA should take tribal fishing rights into account when reviewing Maine's water quality standards. If water quality diminishes to the point where the fish are no longer safe to eat or able to reproduce, tribal fishing rights will suffer a diminution just as surely as they suffer from inadequate quantity of water to support fish.[40]

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[35] 763 F.2d 1032, 1034-35 (9th Cir. 1985).
[36] 141 F.3d 635, 639-40 (6th Cir. 1989).
[37] 443 U.S. 658, 679 (1979).
[38] *Minnesota v. Clark*, 282 N.W.2d 902, 909 (Minn. 1979).
[39] 723 F.2d 1394, 1409-10 (9th Cir. 1983). *See also Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implying reservation of water to preserve tribe's replacement fishing grounds); *Winters v. United States*, 207 U.S. 564, 576 (1908) (express reservation of land for reservation impliedly reserved sufficient water from the river to fulfill the purposes of the reservation); *Arizona v. California*, 373 U.S. 546, 598-601 (1963) (creation of reservation implied intent to reserve sufficient water to satisfy present and future needs).
[40] The leading federal Indian law treatise explains:

Ongoing litigation in Washington State involving questions about the extent to which tribal fishing rights encompass associated rights to protection for fish habitat also informs our analysis.[41] The tribes and the United States have argued that tribal fishing rights impose a duty on the state of Washington to refrain from building or maintaining road culverts that directly block fish passage both to and from breeding areas and therefore significantly and directly kill fish, diminish fish populations, and diminish habitat.[42] In 2013, the court adopted this analysis, concluding that the tribes' treaty based fishing right had been "impermissibly infringed" through the construction and operation of culverts that "has reduced the quantity of quality of salmon habitat, prevented access to spawning grounds, reduced salmon production . . . and diminished the number of salmon available for harvest."[43] The court issued a permanent injunction forcing the State to renovate its culvert system.[44] The decision is currently on appeal, but the district court's reasoning is consistent with the view that tribal fishing rights can be protected under the Clean Water Act.

When diminished water quality has hindered tribal uses of water outside the fishing context, courts have held for tribes and found that a right to put water to use for a particular purpose must include a subsidiary right to water quality sufficient to permit the protected water use to continue. In an Arizona case, *United States v. Gila Valley Irrigation District*, farmers with a more junior right whose properties were located upstream from a reservation were required to take steps to decrease the salinity of the tribe's water so that "the Tribe receives water sufficient for cultivating moderately salt-sensitive crops."[45] Other courts have noted that in some situations protecting water

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> Fulfilling the purposes of Indian reservations depends on the tribes receiving water of adequate quality as well as sufficient quantity. . . . . [H]abitat protection is an integral component of the reserved [fishing] right. In order to protect the fishery habitat, tribes should have a right not only to a sufficient amount of water, but also to water that is of adequate quality.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.03[9], at 1236 (Nell Jessup Newton ed., 2012) (footnotes and citations omitted).

[41] The United States District Court for the Western District of Washington court held that several Washington State tribes' treaty fishing rights "implicitly incorporated the right to have the fishery habitat protected from manmade despoliation." *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (Phase II). The court explained that "the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless." *Id.* at 205. That decision was vacated on procedural grounds. *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc) (requiring plaintiffs to allege specific environmental harms before any declaratory judgment could issue, noting that "[i]t serves neither the needs of the parties . . . nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension").

[42] In *United States v. Washington*, 2007 U.S. Dist. LEXIS 61850, 37-38 (W.D. Wash. Aug. 22, 2007), the district court held in favor of the federal and tribal plaintiffs.

[43] *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. 2013).

[44] *Id.* at 78-79.

[45] 920 F. Supp. 1444, 1454-56 (D. Ariz. 1996), aff'd, 117 F. 3d 425 (9th Cir. 1997).

quality is fundamental to the protection of tribal rights to self-determination.[46] Given the importance of fishing to Maine tribes, protection of water quality sufficient to enable the tribes to continue to fish and to consume the fish they are able to catch is comparable to protecting water quality to allow the tribe in the *Gila Valley* case to continue to grow crops.

In summary, fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. Case law supports the view that water quality cannot be impaired to the point that fish have trouble reproducing without violating a tribal fishing right; similarly water quality cannot be diminished to the point that consuming fish threatens human health without violating a tribal fishing right. A tribal right to fish depends on a subsidiary right to fish populations safe for human consumption. If third parties are free to directly and significantly pollute the waters and contaminate available fish, thereby making them inedible or edible only in small quantities, the right to fish is rendered meaningless. To satisfy a tribal fishing right to continue culturally important fishing practices, fish cannot be too contaminated for consumption at sustenance levels.

3. The Trust Relationship Counsels Protection of Tribal Fishing Rights in Maine

EPA has already recognized that Maine tribes' fishing rights should be considered in regulating water quality in a 2003 decision regarding Maine's authority to issue permits under the Clean Water Act.[47] As EPA noted in that decision, the First Circuit has held that the Indian law canons of construction obliging courts to construe statutes which diminish the "the sovereign rights of Indian tribes . . . strictly" apply to the Maine tribes and that the requirement that ambiguity be interpreted in favor of tribes is "rooted in the unique trust relationship between the United States and Indians."[48]

In its decision, EPA announced that when reviewing proposed permits under the Clean Water Act[49] it would "require the state to address the tribes' uses [for sustenance fishing] consistent with the requirements of the CWA."[50] EPA's 2003 analysis of tribal fishing rights and federal review authority under the Clean Water Act was cogent and the agency should follow through on this policy in reviewing Maine's WQS.[51]

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[46] *See Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1222 (9th Cir. 2000) ("[I]t is difficult to imagine how serious threats to water quality could not have profound implications for tribal self-government."); *City of Albuquerque v. Browner*, 97 F.3d. 415, 423 (10th Cir. 1996) (upholding tribal water quality standards that were more stringent than federal standards and observing that the authority to establish such high standards "is in accord with powers inherent in Indian tribal sovereignty").

[47] 68 Fed. Reg. 65052, 65068 (Nov. 18, 2003).

[48] *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (internal quotation marks omitted).

[49] The EPA specifically cited the provision codified at 33 U.S.C. § 1342(d).

[50] 68 Fed. Reg. at 65,068.

[51] The First Circuit, reviewing this EPA decision in *Maine v. Johnson,* found that EPA's analysis of the relationship between fishing rights and water quality was not ripe for consideration. 498 F.3d 37, 48 (1st Cir. 2007) ("The current relationship of the United States to [Maine] tribes, and the EPA's continued authority under the Clean Water Act to review Maine's exercise of ceded powers, present quite different

Secretary Jewell has recently reaffirmed the federal trust responsibility to tribes. Consistent with the principles of Secretarial Order 3335 on Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes, federal agencies should "[e]nsure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected."[52] In addition, consultation is a critically important part of the United States' government to government relationship with tribes, and the EPA should continue to fully consult with tribes regarding decisions that have implications for trust resources, including fishing rights.[53]

4. Conclusion

The Maine tribes rely on clean water, and in particular, on water of a quality sufficient to allow the tribes to engage meaningfully in fishing in Maine Indian Waters. Maine tribes rely on fish as a dietary staple and vital component of their cultures, and a diminution in their ability to take fish at sustenance levels results in a loss of food as well as a threat to their ability to carry on their traditions.

The Maine tribes have fishing rights connected to the lands set aside for them under federal and state statutes. Further, these fishing rights would be rendered meaningless if they did not also imply a right to water quality of a sufficient level to keep the fish edible so that tribal members can safely take the fish for their sustenance. The right of all four tribes to take fish is well-founded under State as well as Federal law as discussed in this letter.

Thank you for your attention to these matters of great importance to the Maine tribes. I appreciate the opportunity to submit these views for your consideration.

Sincerely,

Hilary C. Tompkins
Solicitor

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questions [from the ones decided in the case]. . . . [W]e take no view today as to the ultimate resolution of these potential issues.").

[52] Secretarial Order 3335 (August 20, 2014), Sec. 5, Principle 2, *available at* http://www.usbr.gov/native/policy/SO-3335_trustresponsibility_August2014.pdf.

[53] *See generally,* Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000).

ATTACHMENT C

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JAN 15 [illegible]

Memorandum

To: Eastern Area Director, Bureau of Indian Affairs

From: Associate Solicitor, Division of Indian Affairs

Subject: Reservation Status of the Houlton Band of Maliseet Indians Under Federal and State Law

On August 27, 1992 the I met with Reid P. Chambers, the attorney for the Houlton Band of Maliseet Indians, and you in an attempt to resolve the Band's concerns regarding the legal status of their tribal trust lands. Those concerns were generated by your June 23, 1992 letter to the tribal chairman, Clair Sabattis, in which you informed the Band that the Bureau of Indian Affairs did not have the authority under the Indian Reorganization Act (48 Stat. 984) to declare its trust property to be an Indian reservation. Your letter incorporated most of the text of a May 27, 1992 memorandum opinion by the Southeast Regional Solicitor. In that opinion the Regional Solicitor asserted that Congress never intended to create a reservation for the Houlton Band. He reached that conclusion because the 1983 amendment to the Maine Indian Claims Settlement Act (94 Stat. 1787) did not expressly state that lands purchased by the Band would be declared a reservation. Mr. Chambers requested that the opinion be revised because it stated that the Maine Indian Claims Settlement Act and its amendments did not create a reservation for the Houlton Band.

I reviewed the Southeast Regional Solicitor's memorandum of May 27, 1992 and the relevant statutes and legislative histories assembled by the Division of Indian Affairs. As a result of my review, I am overruling the Southeast Regional Solicitor's opinion that the Houlton Band of Maliseet Indians' tribal trust lands do not have the status of a reservation for the purposes of federal law. I am taking this action despite my agreement with the Southeast Regional Solicitor's opinion that the Bureau of Indian Affairs (BIA) does not have the authority to declare the Houlton Band's trust property to be a reservation.

The Southeast Regional Solicitor's memorandum opinion addressed the issue of whether the BIA has authority to proclaim the Houlton Band's trust property a reservation. He observed that the Houlton Band of Maliseet Indians became a federally recognized tribe under the Maine Indian Claims Settlement Act. Because the BIA's statutory authority to declare Indian lands to

be a reservation is derived from the Indian Reorganization Act (IRA) and the Houlton Band has not organized under that Act, the Southeast Regional Solicitor concluded that the Bureau does not have the authority to proclaim its trust property to be a reservation. I concur with the Regional Solicitor's analysis and conclusion on that issue.

The Regional Solicitor's memorandum also contains a statement that Congress did not intend the Houlton Band to have a reservation. I disagree with that conclusion. When the Maine Indian Claims Settlement Act and its 1983 amendment (96 Stat. 2268) were enacted by Congress, the Houlton Band did not own any tribal land. Senator Cohen of Maine introduced the 1983 amendment to the Maine Indian Claims Settlement Act because the Band's members were considered ineligible for services from the BIA and the Indian Health Service (IHS). Their ineligibility for services resulted from statutory requirements that they live on or near a reservation. Since the Band had not acquired any trust land at that time, Senator Cohen said, "[t]he amendment I am proposing today would make the band eligible for such services notwithstanding the fact that they have not yet obtained their land". 128 Cong. Rec. 31609 (daily ed. Dec. 16, 1982). (Emphasis added). Representatives Udall and Snowe made similar statements in the House when the legislation was introduced for consideration. 128 Cong. Rec. 32886-32887 (daily ed. Dec. 20, 1982). There is nothing in the legislative history that supports the Regional Solicitor's conclusion that Congress did not intend to create a reservation for the Houlton Band when the referenced acts were passed in 1980 and 1983.

Furthermore, the argument that there is a distinction between designated reservations and tribal trust lands was rejected by the Supreme Court in Oklahoma Tax Commission v. Citizen Band of Potawatomi, 498 U.S. 505, 511 (1991). In Potawatomi the Supreme Court stated that it had never drawn a distinction between a formally designated reservation and tribal trust lands. Indeed, the Court emphasized that the test for determining whether land is an "Indian reservation" or "Indian country" for the purposes of federal law is whether the land has been validly set apart for the use of the Indians under the superintendence of the United States.

The Houlton Band unquestionably meets the Potawatomi test because the Maine Indian Claims Settlement Act clearly states that land purchased by the Houlton Band with federal funds set aside by Congress for that purpose shall be taken into trust by the United States. Therefore, the Houlton Band of Maliseets has an Indian reservation for the purposes of federal law, subject only to the limitations contained in the Maine Indian Claims Settlement Act that apply to all federal Indian reservations in Maine.

As Mr. Chambers's letter of October 2, 1992 stated, there was a misunderstanding about the Band's request for BIA assistance. As a consequence of that initial misunderstanding, your letter of June 23, 1992 did not address the question raised by the Houlton Band. The Houlton Band requested that the Licensing Division of the Maine State Police issue a license to it to conduct High Stakes Beano. In its January 6, 1992 letter responding to the Band's request, the Licensing Division stated that the Houlton Band was not qualified to receive such a license under Me. Rev. Stat. Ann. tit. 17, § 314-A(5) (West Supp. 1991). That subsection states that a tribe's gaming operation must be located in "Indian Territory." According to the Licensing Division, the Houlton Band's tribal trust lands do not constitute "Indian Territory" as defined in Me. Rev. Stat. Ann. tit. 30, § 6205 (West Supp. 1991). Upon receipt of that letter the Houlton Band appealed to you for assistance in resolving the impasse with the state authorities.

Based upon conversations between an attorney in the Division of Indian Affairs and the Maine Attorney General's Office, I believe that the Houlton Band must seek state legislation that expands Maine's statutory definition of "Indian Territory" to include its trust lands. Presently, the state's legal definition of "Indian Territory" is strictly limited to specific tracts of land owned by the Passamaquoddy Tribe and the Penobscot Nation.

In light of the legal analysis presented in this memorandum I recommend that you withdraw your letter of June 23, 1992.

Catherine E. Wilson

Catherine E. Wilson

ATTACHMENT D

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

MAY 16 2000

Gary S. Guzy, Esq.
Office of General Counsel
United States Environmental Protection Agency
Washington, D.C. 20260

Re: Effect of Maine Indian Claims Settlement Act on State of Maine's Application to Administer National Pollutant Discharge Elimination System (NPDES) Program

Dear Mr. Guzy:

In response to your letter dated Oct. 21, 1999, attached is an opinion of the Department of the Interior, Office of the Solicitor, regarding the extent of the State of Maine's jurisdiction over the regulation of water quality in Indian country in light of the Maine Indian Claims Settlement Act. In your letter you indicated that EPA would give great weight to the opinion of the Department of the Interior, since the Department has broad responsibilities in the area of Indian affairs.

While the precise legal issues the state's application raises are of first impression, it is our opinion that as a matter of law, EPA must retain the NPDES permitting authority for discharges within the Indian Territories of the Passamaquoddy Tribe and the Penobscot Indian Nation. As our enclosed opinion shows, the State of Maine cannot demonstrate that it has adequate authority to administer the NPDES program within these Territories. Further, it is our opinion that regardless of EPA's decision on Maine's application, the Agency has a trust responsibility to the tribes in Maine, including the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs and must, therefore, exercise its available authorities to protect tribal lands, waters and other resources.

Thank you for this opportunity to provide the opinion of the Department. Please contact me if you have any questions.

Sincerely,

Edward B. Cohen
Deputy Solicitor

OPINION OF THE DEPARTMENT OF THE INTERIOR, OFFICE OF THE SOLICITOR

OPINION SUMMARY

The State of Maine has applied to administer the Clean Water Act National Pollutant Discharge Elimination System program throughout the state, including within Indian country. The U.S. Environmental Protection Agency (EPA) sought the Department of the Interior's legal opinion on the extent to which, in light of the Maine Indian Claims Settlement Act (MICSA), Maine possesses legal authority over water quality within Indian country. The Clean Water Act requires a state to demonstrate it has such authority to receive program approval.

Under MICSA and the Maine Implementing Act (MIA) it incorporates, Maine is prohibited from regulating "internal tribal matters" within the Indian Territories of the Penobscot Indian Nation and the Passamaquoddy Tribe. This opinion will show that the regulation of water quality, including the regulation of point-source discharges, within these Indian Territories is an "internal tribal matter." The State of Maine, therefore, cannot demonstrate it has adequate authority to administer the National Pollution Discharge Elimination System program for discharges within the Penobscot and Passamaquoddy Indian Territories. Accordingly, it is our opinion that as a matter of law EPA must retain the NPDES permitting authority for discharges within the Indian Territories of the Passamaquoddy Tribe and the Penobscot Indian Nation.

In addition, it is our opinion that even if EPA approves the state's application to administer the NPDES program anywhere within Indian Country in Maine, including the lands of the Houlton Band of Maliseet Indians (Maliseets) and the Aroostook Band of Micmacs (Micmacs), EPA must ensure, through its maintained Clean Water Act authorities and its federal trust obligations, that a state-administered NPDES program within those lands fully protects the Tribal lands, waters and other resources.

EPA MUST ENSURE PROTECTION OF THE WATERS OF THE MALISEETS AND MICMACS

When Congress confirmed the federal recognition of the Houlton Band of Maliseet Indians, 25 U.S.C. §1725(I), and the Aroostook Band of Micmacs, 105 Stat. 1143 (1991), it required the United States to protect these Tribes' resources through the trust responsibility. 108 Stat. 4791 (1994). Regardless of EPA's determination as to whether the State of Maine can demonstrate adequate authority to administer the NPDES program on lands belonging to the Maliseets and Micmacs, EPA must still exercise its authority under the CWA, consistent with the trust responsibility to these Tribes, to ensure the protection of Tribal resources, including lands and waters. See e.g., HRI, Inc. v. Environmental Protection Agency, 2000 WL 14443, *15 (10th

Cir. 2000) (the federal government bears a special trust obligation to protect the interests of Indian tribes); State of Washington, Dept. of Ecology v. U.S.E.P.A., 752 F.2d 1465, 1470 (9th Cir. 1985); Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981). Thus, EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect Maliseet and Micmac tribal water quality from degradation. Seminole Nation v. United States, 316 U.S. 286 (1942). EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. See Letter from Edward B. Cohen, Deputy Solicitor, to John P. DeVillars, Region I Administrator, EPA 2 (Sep. 2, 1997). Specifically, EPA would have to consider the specific uses the Maliseets and Micmacs make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. See Comments Submitted to EPA Regarding the State of Maine's Application for NPDES Authority by the Maliseets and Micmacs. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets and Micmacs even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

MICSA AND MIA SPECIFICALLY ALLOCATE LEGAL JURISDICTION AMONG THE PENOBSCOT INDIAN NATION, PASSAMAQUODDY TRIBE AND MAINE, THEREBY MAKING ANY ASSUMPTION OF BLANKET AUTHORITY BY MAINE INAPPROPRIATE

Several provisions of the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735 (MICSA)[1] concern state jurisdiction over the Passamaquoddy and the Penobscot.[2] These

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[1] Section 1725(b)(1) of MICSA incorporates the Maine Implementing Act, 30 M.R.S.A. §§ 6201-6214 (MIA), but under section 1721, MICSA takes priority over MIA if there is a conflict.

[2] MICSA also addresses the applicability of the federal laws and regulations to Indian tribes. According to section 1725(h) of MICSA, federal laws that are "generally applicable to Indians" are equally applicable in Maine. However, that section also provides that no federal law or regulation shall apply in Maine if it "accords or relates to a special status or right," of or to Indians and also "affects or preempts" state law, including state laws relating to environmental matters. Certainly, the general provisions of the federal Clean Water Act and any other federal environmental law, apply to Indians within the State of Maine. Because section 402 of the Clean Water Act is a law of "general applicability" and not a law affording a "special status or right" to Indians, we need not address whether any "special" federal law would also preemt state law and thus not apply in Maine.

provisions are complex and the State of Maine inappropriately urges EPA to ignore these complexities and simply recognize blanket state authority over the Indian Territories. See generally, Attorney General's Statement of Legal Authority for Maine's NPDES and Pretreatment Programs, pp 33-36 (Nov. 2, 1999). While MICSA indeed generally subjects Indian Tribes in Maine to state jurisdiction,[3] it also provides for the exercise of tribal jurisdiction by the Passamaquoddy and the Penobscot separate and distinct from the civil and criminal jurisdiction of the state[4] and over land or natural resources acquired by the Secretary in trust for the Passamaquoddy and the Penobscot.[5] Accordingly, state jurisdiction is far from absolute. Rather, it is subject to various exceptions specified in MICSA and MIA.[6]

First, MIA provides the Tribes have exclusive authority to enact ordinances regulating, within their territories[7], hunting, trapping or other taking of wildlife and the taking of fish on certain ponds. 30 M. R.S.A. § 6207(1). Second, MIA specifically authorizes the Passamaquoddy and the Penobscot, within their respective Indian Territories, to exercise and

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[3] "The Passamaquoddy Tribe [and] the Penobscot Nation . . . shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act." 25 U.S.C. § 1725 (b)(1) (referencing 30 M..R.S.A. § 6204).

[4] "The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto." 25 U.S.C. § 1725 (f).

[5] "The land or natural resources acquired by the Secretary in trust for the Passamaquoddy Tribe and the Penobscot Nation shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 450f of this title, [the Indian Self-Determination and Education Assistance Act,] or other existing law." 25 U.S.C. § 1724 (h).

[6] For example, rather than providing the state exclusive jurisdiction over fishing within certain waters within the Passamaquoddy and Penobscot territories, MICSA and MIA require the state to exercise its authorities only through a joint State-Indian Tribal commission. 30 M. R.S.A. § 6207(3). Significantly, within the boundaries of the Passamaquoddy and Penobscot reservations, tribal members taking fish for sustenance purposes generally are exempt from any state law and even from the rules of this Commission. 30 M..R.S.A. § 6207(4)

[7] The Passamaquoddy and the Penobscot Indian territories include, respectively, the Passamaquoddy and the Penobscot Indian reservations. 30 M. R.S.A. § 6205.

enjoy all the rights, privileges, powers and immunities of a municipality, including, but without limitation, the power to enact ordinances and collect taxes. Id. at § 6206(1). Third, under MIA, the Passamaquoddy and the Penobscot and their officers and employees shall be immune from suit when the Tribe is "acting in its governmental capacity to the same extent as any municipality or like officer or employees thereof within the State." Id. at § 6206 (2).[8] Finally, and most importantly, the state is prohibited from regulating the internal tribal matters of the Passamaquoddy and the Penobscot, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government [and] tribal elections . . . . 30 M. R.S.A. § 6206(1) (emphasis added).

Thus, while MICSA may generally provide for state jurisdiction over Maine Indian Tribes and their lands, it does not do so absolutely and the exceptions to this rule are significant. Clearly, MICSA and MIA provide a balance of state and tribal interests. See Penobscot Nation v. Fellencer, 164 F.3d 706, 708 (1st Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 2367 (1999) ("Congress sought to balance Maine's interest in continuing to exercise jurisdiction over . . . [tribal] land[s] and members . . . with the . . . [Tribe's] 'independent source of tribal authority, that is, the inherent authority to be self-governing'"). In achieving this balance, Congress preserved much of the Passamaquoddy and the Penobscot's inherent sovereignty, while carving out areas for state authority.

In other words, the reservation in MICSA and MIA of certain aspects of the Passamaquoddy and Penobscot's inherent sovereign authority, especially the reservation of their inherent authority over internal tribal matters, acts as a direct and affirmative limitation on MICSA's grant of jurisdiction to the State of Maine. Thus, in order to determine whether the state has "adequate authority" under section 402 of the CWA to administer the NPDES program within the Indian Territories of the Passamaquoddy and the Penobscot, it is necessary to determine what aspects of the Tribes' inherent authority were reserved to them, and, thereby, not granted to the state under MICSA and MIA.

Under section 402 of the Clean Water Act, the Administrator shall not approve a state's permit program for discharges into navigable waters if the Administrator determines, among other things, that the state lacks adequate authority "to abate violations of the permit or the

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[8] "The Passamaquoddy Tribe, the Penobscot Nation, . . ., and all members thereof, . . . may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine; . . . the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act." 25 U.S.C. § 1725 (d)(1) (referencing 30 M. R.S.A. § 6206 (2)).

permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. 1342(b). Since the State of Maine has applied for program approval for permits within the Indian Territories of the Passamaquoddy and the Penobscot, it is necessary to determine if the state has adequate authority to enforce those permits. As noted above, the heart of this analysis rests on a determination that regulation of point-source discharges within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter."

Here, if the regulation of point-source discharges within the Indian Territories of the Passamaquoddy and the Penobscot would be a regulation of "internal tribal matters," under MIA, ratified by MICSA, the matter "shall not be subject to regulation by the State." 30 M. R.S.A. § 6206(1). It would follow therefore, that in this circumstance, the state could not demonstrate it has "adequate authority to carry out the described program" as section 402 of CWA requires for a successful state application. 33 U.S.C. § 1342(b). Thus, EPA must administer the NPDES program within the Penobscot and Passamaquoddy Indian Territories. 40 C.F.R. § 123.1(h).[9]

THE SCOPE OF "INTERNAL TRIBAL MATTERS" IS A QUESTION OF FEDERAL LAW, INFORMED BY GENERAL PRINCIPLES OF FEDERAL INDIAN COMMON LAW

Whether regulating water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter" is an issue of first impression. However, the legislative histories of MICSA and MIA and First Circuit decisions

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[9] Where a state has applied for authority to run a federal environmental program, EPA, exercising its "core federal trust responsibilities," generally has retained federal authority over environmental pollution affecting the Indian lands. E.g., HRI, Inc. v. EPA, 2000 W.L. 14443; Phillips Petroleum Co. v. United States EPA, 803 F.2d 545 (10th Cir. 1986); State of Washington v. USEPA, 752 F.2d 1465; See also 60 Fed. Reg. 25,718, 25,721 (1995) (delegation of NPDES program to State of Florida would not violate trust doctrine because Agency would retain "full jurisdiction" with respect to Miccosukee reservation). Indeed, where there is any uncertainty about the scope of state jurisdiction or the legal status of the affected territory, these "core federal trust responsibilities" warrant retention of federal authority to protect Indian tribes. HRI, Inc. v. EPA, 2000 W.L. 14443, *15. See also 59 Fed. Reg. 1353, 1542 (1994) (EPA retains control over Yankton waters, deferring decision on "complicated issue" of state's jurisdiction over Indian country); "EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments" at 3-4 (July 10, 1991) (EPA will retain enforcement primacy for Indian lands where a state or tribe cannot demonstrate adequate jurisdiction over pollution sources throughout the reservation). Thus, in the exercise of its "core federal trust responsibilities," and in accordance with the terms of MICSA and MIA, EPA must retain federal authority for the NPDES program within the territories of the Passamaquoddy and the Penobscot.

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provide guiding analytical principles. Akins, 130 F.3d 482; Fellencer, 164 F.3d 706.

First, it is important to acknowledge that the First Circuit has decided that the terms of the settlement acts are to be interpreted in light of general principles of federal Indian common law and, because Congress adopted the phrase "internal tribal matters" in MICSA, interpreting that phrase is a question of federal law. Fellencer, 164 F.3d at 708, 709; Akins, 130 F.3d at 485, 489. MICSA and MIA's legislative histories support the court's reliance on federal Indian common law to determine what is an "internal tribal matter."

In delivering the Committee's report on MIA to the Maine Senate, Senator Samuel W. Collins, Jr., Chairman of Maine's Joint Select Committee on Indian Land Claims, stated:

> To acquire a proper perspective about Indian affairs and the relationship of our own land to Indian rights, we must start with the realization that it is Federal Law which is supreme in this area . . . the premise of this bill and the entire settlement agreement is, that the Indians are Federal Indians. This means that the Indians and their lands are within the exclusive jurisdiction of the Federal Government and its Indian laws. Under this premise, the State has no jurisdiction at all, but the Federal Government has that authority and can presumably delegate it to the State, or, in this instance, ratify and incorporate into Federal Law an agreement between the State and the Indians.

Maine Legislative Record - Maine Senate, April 2, 1980 at 717018.

Similarly, the legislative history of MICSA supports relying on federal Indian law precepts when interpreting provisions of the settlement act. The Senate specifically recognized the hybrid structure of the settlement, providing in some circumstances state authority over the Penobscot and Passamaquoddy, while in other cases, reserving intact the Penobscot and Passamaquoddy inherent sovereignty, consistent with federal Indian law precepts:

> [The] treatment of the Passamaquoddy Tribe and the Penobscot Nation in the Maine Implementing Act is original. It is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing.

S. Rep. No. 96-957, 96th Cong. 2d Sess. at 29 (1980) ("Senate Report") (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)). The House Committee Report states:

> While the settlement represents a compromise in which state authority is extended

> over Indian territory to the extent provided in the Maine Implementing Act, . . . the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs . . . the settlement strengthens the sovereignty of the Maine Tribes.

Id. at 14; H.R. Rep. No. 96-1353 at 14-15, reprinted in U.S. Code Cong. & Admin. News 1980, at 3790 ("House Report") (emphasis added). [10]

General principles of federal Indian law provide a framework for determining whether regulating water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter." Indian tribes have the "inherent powers of a limited sovereignty which has never been extinguished." Bottomly, 599 F.2d at 1066 (in rejecting State of Maine's assertion that Maine Indian tribes are without inherent authority, the court explained that powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty, which has never been extinguished*') (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original). While subject to divestiture by Congress, Indian tribes have "inherent sovereign authority over their members and territory." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983); Bracker, 448 U.S. at 142; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, (1982); United States v. Mazurie, 419 U.S. 544 (1975).[11] Thus, unless expressly divested by Congress, their attributes of inherent sovereignty remain

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[10] See also, Senate Report at 17; House report at 17 (Congress promised that "the Settlement offers protections against . . . [acculturation] being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters").

[11] The Senate Report on the Settlement Act, specifically "predicates the [Penobscot] Nation's [and Passamaquoddy Tribe's] right to be free from state interference [in internal tribal matters] on the Nation's [and the Tribe's] 'inherent sovereignty' as recognized in Bottomly, 599 F.2d 1061 and State v. Dana, 404 A.2d 551 (Me. 1979)." Fellencer, 164 F.3d at 712 (quoting S.Rep. 96-957 at 14). "Both Bottomly and Dana drew on federal Indian common law in recognizing the inherent sovereignty of the Penobscot and Passamaquoddy tribes." Fellencer, 164 F.3d at 712; see Bottomly, 599 F.2d at 1066; Dana, 404 A.2d at 560-61. "By characterizing its recognition of the [Penobscot] Nation's [and the Passamaquoddy Tribe's] sovereignty as 'in keeping with' Bottomly and Dana, Congress signaled its intent that federal Indian common law give meaning to the terms of the settlement," including the term internal tribal matters. Fellencer, 164 F.3d at 712 (quoting S.Rep. 96-957 at 14).

intact. See Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); Akins, 130 F.3d 489 (the court will not infer interference with "inherent self-governing authority of a tribe" in face of Congressional silence); State of Rhode Island, 19 F.3d at 701-02; Bottomly, 599 F.2d at 1066 ("[U]ntil Congress acts, the tribes retain their existing sovereign powers").[12] Tribal sovereignty also carries with it "a historic immunity from state and local control." New Mexico v. Mescalero Apache Tribe, 462 U.S. at 332 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973)). See also, Narragansett Indian Tribe v. Narragansett Elec. Co. 809 F.3d at 914 (state "presumptively lacks jurisdiction" to enforce its laws and regulations within an Indian reservation). In addition, courts have found that tribes retain authority over conduct of non-members within the reservation when conduct threatens or has direct effect on "the political integrity, the economic security or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 & n.15 (1981).

Since only Congress has the power to limit the inherent authority of Indian tribes, state jurisdiction over tribal territory and affairs has been conditioned on the express provisions of Congress. E.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 202, 207 (1987); Fisher v. District Court of Sixteenth Judicial Dist. of Montana, 424 U.S. 382, 382, 386-89 (1976); McClanahan, 411 U.S. at 164, 170-71; Williams v. Lee, 358 U.S. 217, 217, 223 (1959). See also, Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co., 809 F.3d 908, 908, 914 (1st. Cir. 1996) (state "presumptively lacks jurisdiction" to enforce its laws and regulations within Indian reservation). In short, "the Indian sovereignty doctrine, which historically gave state law no role to play within a tribe's territorial boundaries . . . provide[s] a backdrop against which applicable treaties and federal statutes must be read. Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 114, 123-24 (1993). It is presumed that Congress acts in a manner consistent with "the federal role as guarantor of Indian rights against state encroachment." Washington, Dept. of Ecology v. U.S.E.P.A., 752 F.2d at 1470.[13] Finally, the

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[12] In finding that the Penobscot Nation was eligible to be treated as a state for purposes of receiving CWA section 106 grants, EPA stated that the analysis should start from the general Federal Indian law principle that Tribes "possess those aspects of sovereignty not withdrawn by treaty or statute or by implication." Memorandum from Julie Taylor, Chief, General Law Office, Region I, EPA, to Harley F. Laing, Regional Counsel 19 (July 20, 1993) (quoting, Felix Cohen, Handbook of Federal Indian Law 231-32 (1982)).

[13] The Supreme Court found nearly two centuries ago that Congress has a duty to protect the inherent authority of Tribes to govern reservation affairs against state encroachment. See, e.g., Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832); see also State of Washington, Dept. of Ecology v. U.S.E.P.A, 752 F.2d at 1465, 1470; Felix Cohen, Handbook of Federal Indian Law 234-35 (trust "relationship not only preserved tribal government, but insulated it from state interference"). See HRI, Inc. v. EPA, 2000 WL 14443, *15 (federal government

Fellencer Court employed in its analysis special canons of construction "in order to comport with the traditional notions of sovereignty and with the federal policy of encouraging tribal independence." 164 F.3d at 709 (quoting White Mountain Apache v. Bracker, 448 U.S. 136, 143-44 (1980) and citing Oneida v. Oneida Indian Nation of New York, 470 U.S. at 247 (canons of construction rooted in unique trust relationship between U.S. and Indians)).

Specifically, EPA's interpretation of principles of federal Indian law in other circumstances informs our analysis here. Since 1984, EPA has recognized, in keeping with the principle of Indian self-government, that tribal governments are the "appropriate . . . parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace." "EPA Policy for the Administration of Environmental Programs on Indian Reservations at 2 (Nov. 8, 1984). In the WQS preamble, EPA stated "Tribes are likely to possess sufficient inherent authority to control reservation environmental quality" and that the Agency believes "Congress . . . expressed a preference for Tribal regulation of surface water quality." 56 Fed. Reg. at 64878. EPA long has recognized that:

> Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others.[14]

> Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons. . . . In short, clean water is a crucial resource that plays a central role in Tribal culture. Because clean water has a direct effect on the . . . health and welfare of . . . Tribes that is serious and substantial, . . . Tribes have a strong interest in regulating on-reservation water quality.[15]

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bears special trust obligation to protect interests of Indian tribes, including protecting tribal property and jurisdiction).

[14] "EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments" (July 1991).

[15] EPA Memorandum in Support of Motion for Summary Judgment, p. 16 (filed in State of Montana v. United States Environmental Protection Agency, 941 F. Supp. 945 (D. MT 1996)).

> [C]lean water, including critical habitat (i.e., wetlands bottom sediments, spawning beds, etc.) is absolutely crucial to the survival of many Indian reservations," particularly those dependent on sustenance fishing rights.[16]

In summary, EPA has determined that the CWA is effectively a legislative determination that "activities which affect surface water and critical habitat quality may have serious and substantial impacts on a community's health or welfare." 56 Fed. Reg. 64876; See 33 U.S.C. § 1251(a). It is with these principles of federal Indian common law as the backdrop that we analyze, according to principles the First Circuit established in Akins and Fellencer, whether regulation of water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories is an "internal tribal matter."

REGULATING WATER QUALITY, INCLUDING POINT-SOURCE DISCHARGES, WITHIN PENOBSCOT AND PASSAMAQUODDY INDIAN TERRITORIES IS AN "INTERNAL TRIBAL MATTER"

In order to determine what constitutes an "internal tribal matter," the First Circuit in Akins and Fellencer examined, in addition to the relevant legislative history, MIA's express statutory examples of "internal tribal matters." Akins, 130 F.3d at 486, 488; Fellencer 164 F.3d at 708-709. The First Circuit cautioned, however, that the "list is not exclusive or exhaustive"[17] and the examples "provide limited guidance."[18] When faced with facts that "did not fit neatly within any of these categories,"[19] the First Circuit developed and applied factors to determine what constitutes an "internal tribal matter." 130 F.3d at 487-488; 164 F.3d at 709-713.

Statutory Definitions of "Internal Tribal Matters"

MIA defines an internal tribal matter as "including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income." 30 M. R.S.A. § 6206(1). Two of those six examples of "internal tribal" authority -- "the right to reside in the respective Indian territories" and "tribal government" -- are of particular relevance here in

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[16] 56 Fed. Reg. at 64878.

[17] Fellencer; 164 F.3d at 709.

[18] Id.; Akins, 130 F.3d at 486.

[19] Akins, 130 F.3d at 486.

determining whether regulation of water quality, including point-source discharges, is an internal tribal matter.

A. Regulation of the "Right to Reside" as an Internal Tribal Matter is Relevant to the CWA

The tribes' right to decide who may reside within their respective Indian Territories is tantamount to the having the right to exclude persons from these territories. The right to exclude clearly includes the right to regulate. [20] As an exercise of this right to determine who may reside and who may be excluded, for example, the Penobscot Nation has adopted a residency ordinance that permits the presence of non-members within the Penobscot territory only at the "sufferance of the Penobscot Nation" and "in accordance with the tribal laws, customs and traditions." Presence of Non-Members at or Within Penobscot Indian Territory, Chapter 11. This ordinance specifically authorizes the removal of non-members whose presence "threatens the health, safety or welfare of the Penobscot Nation." Id. at § 7 E. Additionally, general federal Indian common law would support the principle that the tribes retain authority to regulate conduct, especially conduct that may threaten tribal health or welfare, within Indian territories. See discussion of Indian common law, above; Oklahoma Tax Comm'n v. Citizen Band Potawatami Indian Tribe, 498 U.S. 505,509 (1991); Montana v. United States, 450 U.S. 544, 566 & n.15 (1981).

In the WQS preamble, EPA determined that the CWA is effectively a legislative determination that "activities which affect surface water and critical habitat quality may have serious and substantial impacts on a community's health or welfare." 56 Fed. Reg. 64876; see 33 U.S.C. § 1251(a). The protection of health and welfare is one of the core purposes of environmental protection. The "Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare." 56 Fed. Reg. at 64878; see also 33 U.S.C.§ 1313(c)(2)(A) (purpose of water quality standards is to protect public health and welfare). EPA has also made generalized findings, supported by the overall purposes of the CWA and those of the water quality standards program in particular, that water quality impacts from non-Indian activities would generally have "serious and substantial impacts on tribal health and welfare." 56 Fed. Reg. at 64878.

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[20] As explained above, under Akins and Fellencer and the legislative history of MICSA and MIA, federal Indian common law informs the interpretations of the settlement acts. Here, relevant federal cases include New Mexico v. Mescalero Apache Tribe, 462 U.S. at 333 ("A tribe's power to exclude non-members entirely or to condition their presence on the reservation is . . . well established"); Merrion, 455 U.S. at 141 ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power includes the lesser power to place conditions on entry, on continued presence or on reservation conduct . . . ").

Thus, since the regulation of water quality, including point-source discharges, is an activity that threatens or has a direct effect on tribal health or welfare, it is subject to tribal regulation as an exercise of the right to reside within the respective Indian territories, which is an internal tribal matter. Since the Penobscot, or similarly the Passamaquoddy, can pursuant to MICSA and MIA's exclusive tribal authority over "internal tribal matters" remove a non-member for threatening tribal health, safety or welfare, then clearly the Penobscot and Passamaquoddy can take measures short of removal, to control such behavior which may have the same detrimental affects. However, we need not rest a finding of "internal tribal matters" solely on the definition of "right to reside." MIA also provides that "tribal government" is an example of an "internal tribal matter." Further, as noted above, the First Circuit has found that these examples are not "exclusive or exhaustive." Fellencer, 164 F.3d at 709.

B. Application of the Authority of "Tribal Government" as an Internal Tribal Matter is Relevant to the CWA

In addition to "the right to reside within the respective Indian territories," discussed above, MIA also provides that "internal tribal matters" include the exercise of authority as a "tribal government." 30 M. R.S.A. § 6206(1). EPA has long recognized that "water quality management serves the purposes of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government." 56 Fed. Reg. at 64879. In discussing the nature of the Maine Implementing Act, the Senate Report stated that MIA "is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing." S. Rep. No. 96-957, at 29 (citing Santa Clara Pueblo, 436 U.S. 49) (emphasis added). Thus, since water quality management is crucial to self-government and MIA recognizes the inherent authority of the Passamaquoddy and the Penobscot to be self-governing, then the retained right of tribal government, must include the right to regulate water quality, including point-source discharges, within the Indian Territories.

As demonstrated above, the regulation of water quality, including the regulation of point-source discharges, within the Penobscot and Passamaquoddy Indian Territories can be found to be an internal tribal matter based on one or more of the specific examples MIA provides for what is included within "internal tribal matters." We believe that either the exemplar of "the right to reside" or "tribal government" provides adequate support for this conclusion. Nevertheless, regardless if one or both of these examples is sufficient for a finding of internal tribal matters here, such a conclusion also is bolstered by factors identified in Akins and supplemented in Fellencer as criteria to consider in determining what constitutes an "internal tribal matter." See Akins, 130 F.3d at 486; Fellencer, 164 F.3d at 709-10.

These factors are: (1) does the activity regulate only tribal members; (2) does the activity

relate to the lands that define the Tribes' territories; (3) does the activity affect the tribes' ability to regulate its natural resources; (4) does the activity implicate or impair any interest of the State of Maine; and (5) is viewing the activity as an "internal tribal matter" consistent with prior legal understandings. Fellencer, 164 F.3d at 709 (quoting Akins, 130 F.3d at 486). In a more recent case, the First Circuit applied these factors, and added one additional consideration: the statutory origins "of the [community nurse] position involved in that case." Fellencer, 164 F.3d at 709-10.

Factor 1: Does the Tribal Activity Regulate only Tribal Members?

Here, the regulation of water quality, including point-source discharges, within the Passamaquoddy and Penobscot Indian Territories would regulate both tribal and non-tribal discharges. However, such regulation would more significantly impact the health and welfare of tribal members than non-members. The discharge of pollutants from these point-source discharges affect the very waters upon which the Passamaquoddy and Penobscot depend for fulfilling their statutorily-protected sustenance fishing right and for cultural and spiritual sustenance. Specifically, Passamaquoddy Tribal members use these waters for "fishing, trapping, clamming and other resource-based activities that form a large part of their heritage and their culture." Comments of the Passamaquoddy Tribe on the Legal Authority of the State of Maine to Administer the NPDES Program for the Waters of the Passamaquoddy Indian Territory at 18. In Fellencer, where the disputed activity affected some non-members, but primarily affected tribal members, the court held that modest non-member effects when compared with broad-based tribal member impacts, does not defeat a determination that the activity is an internal tribal matter. Fellencer, 164 F.3d at 710. *See e.g.*, 56 Fed. Reg. 64876; Montana v. USEPA, 137 F.3d 1 at 1141. Accordingly, like Fellencer, where a non-Tribal nurse was dismissed based on considerations of health and welfare of Tribal members, the fact that some non-members would be regulated in this instance, does not defeat a determination that the activity is an internal tribal matter.

Factor 2: Does the Tribal Activity Relate to the Lands that Define the Tribes' Territories as described in MICSA and MIA?

Section 6206(1) of MICSA reserves the Tribes' authority over internal tribal matters "within their respective Indian territories." The activity at issue here is the regulation of water quality, including point-source discharges, solely within the Passamaquoddy and Penobscot Indian Territories. Accordingly, like the timber permits in Akins which regulated "the very land that defines the territory" the activity here regulates activity only with the Penobscot and Passamaquoddy Indian Territories. Thus, analysis under this factor weighs completely in favor of finding this activity to be an internal tribal matter.

Factor 3: Does the Tribal Activity Affect the Tribes' Ability to Regulate its Natural Resources?

Section 1724(h) of MICSA specifically reserves to the Passamaquoddy and the Penobscot the authority to manage their respective lands and natural resources pursuant to the Indian Self-Determination and Education Assistance Act (ISDA) or other existing law, such as, for instance, the Clean Water Act. In Akins, the court found that "it has long been understood that the power to issue permits is an indirect method of managing a natural resource." Akins, 130 F.3d at 488 (quoting California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987)). The natural resources at issue here are the water and water-related (e.g., fish, aquatic habitat, other aquatic vegetation) resources within the Passamaquoddy and Penobscot Indian Territories.[21] The discharge of pollutants into the Tribes' waters has a direct effect on the quality of these waters, the health of the Tribes' water-related resources and on the health and welfare of tribal members who use and consume the water and water-related resources. Thus, like the timber permits in Akins, the regulation of water quality through the issuance and enforcement of discharge permits, "involves the regulation and conservation of natural resources belonging to the tribe[s]." Akins, 130 F.3d at 488. Therefore, as in Akins, the activity here, the regulation water quality, including point-source discharges, affects the Tribes' ability to regulate their natural resources and, thus, weighs in favor of finding this activity to be an internal tribal matter.

Here, the interests of the Penobscot and Passamaquoddy in the health of the water resources within their Indian Territories cannot be overstated. The Penobscot and Passamaquoddy depend on the water within their territories for fulfilling their statutorily-protected sustenance fishing right and for cultural and spiritual sustenance. Unfortunately poor water quality in Maine already may have impacted the Penobscot and Passamaquoddy's exercise of these rights. Currently, all lakes in Maine are subject to a Fish Consumption health warning as a result of water pollution. Comments of Donald Soctomah, Representative of the Passamaquoddy Tribe to the Maine legislature, On Maine's Application to EPA for NPDES Delegation, Feb. 28, 2000. The Bangor Daily News recently cited the St. Croix River, which runs through the Passamaquoddy territory, as the 7th worst river in the U.S. due to the amount of pollutants it receives. Bangor Daily News, February 17, 2000. The polluting discharges to the St. Croix river are primarily attributable to pulp and paper mills, an industry similarly discharging into the Penobscot River. Dioxin, from these pulp and paper mills, has accumulated in fish in the Penobscot River at levels unfit for human consumption within the Penobscot Indian Nation's territory. As a result, since 1987, the State of Maine has maintained a fish advisory warning against the consumption of fish caught in that area. Although section 1721(b) of

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[21] MIA defines "land or other natural resources" to include "water and water rights and hunting and fishing rights." 30 M. R.S.A. § 6203(3).

MICSA, by ratifying section 6207(4) of MIA, recognized the tribes' rights to sustenance fishing within their reservations, pollution has all but eliminated the ability of the Penobscot to exercise this reserved right.

Factor 4: Does the Tribal Activity Implicate or Impair Any Interest of Maine?

Certainly the state has an interest in protecting water quality within its boundaries. As in Fellencer, where the state, although not asserted, generally had "a strong interest in protecting all employees against discrimination through its Maine Human Rights Act (MHRA)," here too the state has an interest in protecting the quality of all its surface waters from point-source discharges through the CWA's NPDES program. See Fellencer, 164 F.3d at 710 (citing 5 M. R.S.A. §4552; Maine Human Rights Comm'n v. Local 1361, United Paperworkers Int'l Union, 383 A.2d 369, 373 (Me. 1978) (stating that the MHRA "was meant to have very broad coverage")). Yet, despite the court's finding in Fellencer that the state had a strong interest in protecting all employees and that the MHRA was meant to have very broad coverage, the court still held that the decision to terminate the employment of a community nurse was an internal tribal matter, not subject to state regulation under the MHRA. Fellencer, 164 F.3d at 710. Thus, here, like Fellencer, the state's interest in protecting its water quality, even if it is a strong interest, is not, in itself, sufficient to defeat a determination that the regulation of the water quality, including point-source discharges, within the Passamaquoddy and Penobscot Indian Territories is an internal tribal matter.

Moreover, in comparing the intensity of the state and tribal interests at stake here, it is important that unlike Fellencer, here, under the CWA, the state has alternative means for protecting its interest other then through the application of state law to the Indian Territories. Recognizing that inter-jurisdictional disputes over water quality protection are inevitable, the CWA provides specific mechanisms, through the 401 certification processes, to protect the interests of neighboring states and tribes. See generally, 33 U.S.C. §1341. The state will be able to take advantage of these particular statutory processes as a state which is authorized to administer CWA programs, even without program approval over Indian Territories. Thus, the state need not exercise permitting authority over discharges within Passamaquoddy and Penobscot Indian Territories in order to protect its interest. Since the state's interest can be protected through other specific statutory processes, these interests are outweighed by the tribes' interest in protecting their water quality.[22]

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[22] In balancing the interests of the state and the Tribes, it is important to note that the discharges at issue here, those within the Passamaquoddy and Penobscot Indian territories, only represent a small percentage of the approximately three hundred and fifty, EPA-permitted discharges in the entire State of Maine. Communication from EPA Region I, Office of Regional Counsel.

Factor 5: Would a finding of "Internal Tribal Matters" Here Comport with Prior Legal Precedent?

As demonstrated in the above analysis, while this would be a case of first impression, it would be consistent with prior First Circuit legal precedent and federal Indian common law to conclude regulation of water quality, including point-source discharges, into rivers within the Penobscot and Passamaquoddy Indian Territories, is an internal tribal matter. Viewing control over water quality, including point-source discharges, as an internal tribal matter would be consistent with the court's prior understanding in Akins that the regulation of tribal natural resources through the issuance of permits is an internal tribal matter. 130 F.3d 482. Similarly, viewing control over water quality, including point-source discharges, as an internal tribal matter would be consistent with the courts prior understanding in Fellencer that decisions having a direct effect on tribal health and welfare are internal tribal matters. 164 F.3d 706.

Further, it is consistent with general principles of federal Indian common law and special canons of construction relied upon in the First Circuit to determine that the Penobscot and Passamaquoddy's authority over internal tribal matters includes the authority to control conduct within their Territories that threatens or has a direct effect on the political integrity, the economic security or the health or welfare of the tribe. Courts have consistently upheld inherent tribal authority to regulate water quality under the CWA. E.g., Montana v. USEPA, 137 F.3d 1135 at 114 (finding tribal authority over nonmember pollution sources based on finding that such sources directly effect tribal health and welfare); City of Albuquerque v. Browner, 97 F.3d 415, 423 (10th Cir. 1996), *cert. denied*, 118 S.Ct. 410.

Such a finding also is consistent with prior EPA statements recognizing the inherent sovereign authority of Indian tribes over water quality regulation within tribal lands. "[R]egulation of water quality resides comfortably within a tribe's lawful authority under the Montana test because nonmember activity affecting water quality is likely to threaten tribal health or welfare." EPA Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment in Montana v. USEPA, 941 F. 945. See also Supplemental Brief of Federal Appellees in Montana v. USEPA, 137 F.3d 1135 ("water quality management serves the purposes of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government")[23]; 56 Fed. Reg. 64,879. Finally, EPA's regulations anticipated that

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[23] The Maine Implementing Act (MIA) recognizes the inherent authority of a tribe to be self-governing. S. Rep. No. 96-957, at 29. Thus, since water quality management is crucial to self-government and MIA recognizes the inherent authority of the Passamaquoddy and the Penobscot to be self-governing, then the retained right of tribal government, a statutory example of an internal tribal matter, must include the right to regulate water quality.

"[i]n many cases, States . . . will lack authority to regulate activities on Indian lands. 40 C.F.R. § 123.1(h).[24]

Thus, concluding that "internal tribal matters" includes the regulation of water quality, including the regulation of point-source discharges within the Penobscot and Passamaquoddy Indian Territories, comports with prior legal understandings.

Fellencer's Supplemental Factor: Do the Statutory Origins of the Program Over which the Tribe Asserts Authority have Particular Bearing on finding "Internal Tribal Matters?"

Following an analysis of the five Akins factors for determining what is an "internal tribal matter," the First Circuit in Fellencer, also considered the statutory origins of the community nurse position involved in that case. 164 F.3d 712. As the First Circuit stated in Fellencer: "Apart from the statutory language, judicial precedent, legislative history and federal Indian common law, the Nation's employment of a community health nurse has particular internal tribal matter implications because of the statutory origins of the position." 164 F.3d 712-713. The community nurse position at issue in Fellencer was funded by the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. § 450, a federal statute containing strong provisions regarding the importance of Indian self-governance and supported by ample legislative history on that point. *See, e.g.*, 25 U.S.C. s 450 (l)(2) (Congress declared ISDA is "crucial to the realization of [tribal] self-government") and H. Rep. No. 1600, 93rd Cong., 2nd Session (1974), *reprinted in* 1974 U.S.C.C.A.N. 775, 7781 (ISDA articulates "policy of Indian control and self-determination consistent with the maintenance of the federal trust responsibility and the unique Federal-Indian relationship").

Significantly, the activity in question here, regulating water quality, including point-source discharges, within the Penobscot and Passamaquoddy Indian Territories, also has the ISDA as a statutory origin. Section 1724(h) of MICSA provides that trust lands and natural resources of the Tribes "shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 45f of this title [the Indian Self-Determination Act] or other existing law." (Emphasis added.) MICSA's provision that the Tribes will manage natural resources "in accordance with" the ISDA indicates Congress' desire to preserve and protect Tribal governmental authority over those resources. See 25 U.S.C. s 450(l)2) (Congress declared ISDA "crucial to the realization of [tribal] self-government').

The NPDES program for which the state seeks approval also has its statutory origin in the federal Clean Water Act. According to the WQS preamble, "EPA . . . believes that Congress . . . expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA," and, that like the administration of community health services studied in Fellencer, the "management of water quality is crucial to self government." 56 Fed. Reg. at 64878-79. In Fellencer, the court held that "the federal employment preference [in the ISDA] counsels against the application of Maine law in this employment discrimination context." Fellencer, 164 F.3d at 713. Similarly, the federal preference for tribal regulation of surface water quality in the CWA counsels against the application of Maine law to the territories of the Passamaquoddy and Penobscot under the NPDES program. Finally, in Fellencer, the court held that since such preferences have been described as furthering self-government, the "decision . . . to terminate the employment of a community health nurse was an "internal tribal matter" within the meaning of the Settlement Act, and hence . . . [not subject] to state . . . jurisdiction." Id. Here, since the preference for tribal regulation of water quality within the Passamaquoddy and Penobscot Indian Territories also furthers tribal self-government, decisions related to the issuance and enforcement of discharge permits is an internal tribal matter within the meaning of the Settlement Act, and hence, not subject to state jurisdiction.

Or, as phrased in terms the First Circuit used in Fellencer: The "[Tribes' authority over water quality within their territories] has particular "internal tribal matter" implications because of the [legal] origins of the [tribal activity]." Both the Indian employment preference at issue in Fellencer and the regulation of water quality within the Penobscot and Passamaquoddy Indian Territories rely on statutory origins that emphasize the authority of the Tribes to be self-governing. Accordingly, as in Fellencer, the statutory support for the tribal activity have "particular 'internal tribal matter' implications." 164 F.3d 712-713.

CONCLUSION

In summary, the regulation of water quality, including point-source discharges, is an internal tribal matter of the Penobscot and Passamaquoddy because it 1) is a component of the Passamaquoddy's and the Penobscot's retained inherent right to determine who resides within their respective Indian Territories and under what conditions, 2) is essential to tribal government and 3) meets each of the five factors considered in Akins, 130 F.3d at 486, and the additional factor considered in Fellencer, 164 F.3d at 712-13. According to the terms of the Settlement Act, as an internal tribal matter, the State of Maine is prohibited from regulating water quality, including point-source discharges, within the Territories of the Passamaquoddy and the Penobscot. Therefore, under section 402 of the CWA, the state cannot demonstrate adequate authority to administer the NPDES program within these Territories. Accordingly, EPA cannot make the mandatory findings of § 402(b) and thus, must administer the NPDES program within the Penobscot and Passamaquoddy Indian Territories. See 40 C.F.R. § 123.1(h). Finally,

regardless if EPA approves the state's application for the NPDES program within any area of Indian Country of Maine, EPA must, in accordance with the best interests of the Tribes and the most exacting fiduciary standards, faithfully exercise its federal authority and discretion to protect tribal water quality from degradation.